In the High Court of Himachal Pradesh, Shimla.

CWP 314 of 2004.

Judgment reserved on 5.7.2007.

Decided on 17th July, 2007.

O.P.Koundal ….Petitioner.

Versus

Parvatiya Gramin Bank and others ….Respondents.

Coram

The Hon'ble Mr. Justice Dev Darshan Sud, J.

Whether approved for Reporting? Yes.

For the petitioner	**Mr. Surinder Sharma, Advocate.**
For respondents 1 and 4	**Mr. K.D.Sood, Advocate.**
For respondent No. 2	**Mr. Sandeep Sharma, Assistant Solicitor General of India.**
For respondent No. 5	**Mr. B.N.Gupta, Advocate.**

Dev Darshan Sud, J.

This writ petition has been preferred by the petitioner challenging Annexure PC, dated 15.3.2004, by which respondent No. 5 has been appointed to Scale III in the Parvatiya Gramin Bank- Respondent No. 1. A further prayer has been made by the petitioner that an

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Whether Reporters of the Local Papers may be allowed to see the Judgment? Yes.

appropriate direction/order be issued to respondent No. 1 promoting him against the said post and be granted all the consequential benefits ensuing therefrom. A prayer is also made for directions to be issued to the respondents directing them to produce the record of selection. The petitioner has averred that according to the Recruitment and Promotion Rules applicable to and governing the conditions of service of petitioner and respondent No. 5, Scale III posts which have been grouped together in Group A are to be filled in 100% by way of promotion to be made on the basis of seniority –cum-merit. Petitioner submits that according to the Recruitment and Promotion Rules such promotion is to be made from Scale II officers on the basis of interview and assessment of Performance Appraisal Reports for the preceding five years as an officer in the Scale II post. The minimum qualifying marks in the interview are 50% out of 25 marks and 75 marks out of 100 are reserved for being awarded on the basis of the Performance Appraisal Reports.

The petitioner alleges that he is working as Scale II officer in Bhanjrara (Tissa) Branch of the bank

and according to the seniority list of Scale II officers, he is senior to respondent No. 5. Petitioner contends that under such circumstances all other things being equal, seniority is to be given preference which has been given a go by by the respondents. He submits that the consideration has been improper and the rule of seniority cum merit has been flouted by the respondents.

The respondent bank in its reply has stated that the selection to officer Scale III was made by a committee constituted in accordance with rule 3 (g) of the revised Recruitment and Promotion Rules, 1998. The petitioner was not found eligible for promotion to the post of Scale III officer and hence respondent No. 5 who was also considered has been promoted. The eligibility of the petitioner to be considered for promotion has not been denied, but according to the respondents, his performance was found to be below the bench mark prescribed by the rules and hence he could not be selected.

I have heard the learned counsel for the parties and have gone through the record. The record of the selection committee was also made available for the perusal of this Court.

Third Schedule to Rule 6 of the Regional Rural Banks (Appointment and Promotion of Officers and other employees) rules, 1988 provides for the method and mode of recruitment. Relevant part of the Schedule is reproduced hereunder:

" THIRD SCHEDULE
(See rule 6)

Appointment to different categories of officers and other employees to group "A" "B" and "C" posts whether by direct recruitment or by promotion shall be effected as follows:

1. (a)	**Name of Post**	**Scale III Officer.**
(b)	**Classification**	**Group "A"**
(c)	**Source of Appointment**	**100% by promotion.**
(d)	**Whether promotion to be made on seniority basis or seniority-cum -merit basis.**	**Promotion shall be made on the basis of seniority-cum -merit.**
(e)	**Eligibility**	**Officers holding post for Seven years in scale II on Regular basis in the Regional Rural Bank shall be considered for promotion to scale III post in that bank.** **Provided that no officer shall be considered for promotion unless he has**

	been confirmed in feeder grade post. **Provided further that the Board may with the prior approval of National Bank, relax the qualifying service for a period not exceeding two years, if eligible officers are not available.**

Note: I The Senior Managers/ Area Managers/ Officers in scale II eligible for promotion to the post of General Manager officer scale III on or before the publication of this notification shall continue to be considered for promotion to scale III officer post.

II. The service of the incumbents, who are holding the post eligible for promotion before publication of this notification shall continue to be counted for the purpose of promotion to the scale III officer post.

(f) Mode of selection	**The selection of the candidates shall be made by the committee on the basis of interview and by the committee on the basis of interview and assessment of performance. Appraisal Reports for the preceding five years as an officer in scale II post.**

(g)	**Composition of Committee**	**The committee (for considering promotion) shall consist of the following persons, namely** **(i) Chairman of the concerned Regional Rural Bank – Chairman.** **(ii) A director nominated by the sponsor bank; Member.** **(iii) A director nominated by the National Bank; Member.**

Note: If none of the members of the Committee belongs to Scheduled Caste / Scheduled Tribes, the board may nominate person belonging to Scheduled Caste or Scheduled Tribe as an additional member and such person shall participate in the process of selection by the concerned committee.

(h)	**Reckoning of the minimum eligibility.**	**The minimum eligibility in terms of the number of year of service for promotion shall be reckoned as on the 1st April of the year in which the vacancy is expected to arise or has actually arisen.**
(i)	**Number of candidates to**	**The number of candidates to**

be considered for promotion		**be considered for promotion from Officer Scale II to Officer Scale III shall be restricted to three times the number of vacancies available for promotion.**
(j)	**Selection Process**	**The selection shall be on the basis of performance in the interview and Performance Appraisal Reports for preceding five years as per the division of marks given below:**
(A)	**Interview**	**25 Marks The minimum qualifying marks in the interview are fifty percent.**
(B)	**Performance Appraisal Report**	**Performance Appraisal Reports for the preceding five years shall be considered for the purpose of awarding marks for promotion.**
	Total Marks:	**100 Marks….”**

Rule 6 of the Rules provides:-

> **“6. Filling up of vacancies:- All vacancies determined under rule 5 by the Board shall be filled by promotion or**

> **direct recruitment in accordance with the provisions contained in these rules and third schedule to these rules."**

Learned counsel has emphasized on clause 1(d) which provides that the promotion is to be on the basis of seniority-cum-merit and comparative merit has no place in such selection. He submits that the respondents have acted contrary to the accepted norms to be followed in the cases of seniority cum merit by bypassing the normal procedure. Learned counsel has placed reliance on B.V.Sivaiah and others v. K.Addanki Babu and others (1998) 6 SCC 720, wherein it was held:

> **"9. The principle of "merit-cum-seniority" lays greater emphasis on merit and ability and seniority plays a less significant role. Seniority is to be given weight only when merit and ability are approximately equal. In the context of Rule 5(2) of the Indian Administrative Service/ Indian Police Service (Appointment by Promotion) Regulations, 1955 which prescribed that "selection for inclusion in such list shall be based on merit and suitability in all respects with due regard to seniority" Mathew, J. in Union of India v. Mohan Lal Capoor (1973) 2 SCC 836) has said: (SCC p.856, para 37):**

" For inclusion in the list, merit and suitability in all respects should be the governing consideration and that seniority should play only a secondary role. It is only when merit and suitability are roughly equal that seniority will be a determining factor, or if it is not fairly possible to make an assessment inter se of the merit and suitability of two eligible candidates and come to a firm conclusion, seniority would tilt the scale."

Similarly, Beg, J. (as the learned Chief Justice then was) has said: (SCC p. 851, para 22):

"22. Thus, we think that the correct view, in conformity with the plain meaning of words used in the relevant Rules, is that the 'entrance' or 'inclusion' test for a place on the select list, is competitive and comparative applied to all eligible candidates and not minimal like pass marks at an examination. The Selection Committee has an unrestricted choice of the best available talent, from amongst eligible candidates, determined by reference to reasonable criteria applied in assessing the facts revealed by service records of all eligible candidates so that merit and not mere seniority is the governing factor."

10. On the other hand, as between the two principles of seniority and merit, the criterion of "seniority-cum-merit" lays greater emphasis on seniority. In *State of Mysore v. Syed Mahmood AIR 1968 SC 1113* while considering Rule 4(3)(b) of the Mysore State Civil Services General Recruitment Rules, 1957 which required promotion to be made by selection on the basis of seniority-cum-merit, this Court has observed that the Rule required promotion to be made by selection on the basis of "seniority subject to the fitness of the candidate to discharge the duties of the post from among persons eligible for promotion". It was pointed out that where the promotion is based on seniority-cum-merit, the officer cannot claim promotion as a matter of right by virtue of his seniority alone and if he is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted.

11. In *State of Kerala v. N.M.Thomas (1976) 2 SCC 310* A.N.Ray, C.J. has thus explained the criterion of "seniority-cum-merit": (SCC p.335, para 38)

" With regard to promotion the normal principles are either merit-cum-seniority or seniority –cum- merit. Seniority-cum-merit means that given the minimum

necessary merit requisite for efficiency of administration, the senior though the less meritorious shall have priority."

12. The learned counsel for the regional rural banks and the promoted officers have, however, placed reliance on para 7 (c) of the Second Schedule to the Rules which prescribes that the mode of selection for promotion would be interview and assessment of performance reports for the preceding three year periods and have submitted that under the criterion of "seniority-cum-merit", as prescribed under the Rules, comparative merit has to be assessed for the purpose of promotion. Reliance has been placed on the following observations in *State of Mysore v. C.R.Sheshadri (1974)4 SCC 308 (SCC p.311, para 2)*

"However, if the criterion for promotion is one of seniority-cum-merit, comparative merit may have to be assessed if length of service is equal or an outstanding junior is available for promotion."

18. We thus arrive at the conclusion that the criterion of "seniority-cum-merit" in the matter of promotion postulates that given the minimum necessary merit requisite for efficiency of administration, the senior, even though

less meritorious, shall have priority and a comparative assessment of merit is not required to be made. For assessing the minimum necessary merit, the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employee who is eligible for consideration for promotion. Such assessment can be made by assigning marks on the basis of appraisal of performance on the basis of service record and interview and prescribing the minimum marks which would entitle a person to be promoted on the basis of seniority-cum-merit.

29. From the circular dated 16.3.1992 laying down the promotion process, it is evident that selection was to be made on the basis of marks to be awarded by the Selection Committee and that out of a total number of 100 marks, 55 marks were to be awarded for seniority while 25 marks were assigned for performance and 15 marks for interview. There was no indication in the said circular as to how 55 marks for seniority were to be given to the Branch Managers who were eligible for consideration for promotion on 31.3.1992. The said circular did not prescribe minimum qualifying marks for assessment of

> **performance and merit on the basis of which an officer would be considered for being selected and, as pointed out by the High Court, the selection was made of only those officers who secured the highest number of marks amongst the eligible officers. In the circumstances, the High Court, in our view, has rightly held that this method of selection was contrary to the principle of "seniority-cum-merit" and it virtually amounts to the application of the principle of "merit-cum-seniority". We, therefore, do not find any merit in Civil Appeals Nos. 3809-3810 and 3798 of 1996 and the same are also liable to be dismissed."**
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> ***(Paras 9 to 12, 18 and 29 pages 726-727, 730 and 135)***

He further submits that the Hon'ble Supreme Court in Union of India and others v. Lt. Gen. Rajendra Singh Kadyan and another (2000) 6 SCC 698, has held:

> **"12. Wherever fitness is stipulated as the basis of selection, it is regarded as a non-selection post to be filled on the basis of seniority subject to rejection of the unfit. Fitness means fitness in all respects. "Seniority-cum-merit" postulates the requirement of certain minimum merit or satisfying a benchmark previously fixed. Subject to fulfilling this**

> **requirement the promotion is based on seniority. There is no requirement of assessment of comparative merit both in the case of sonority-cum-fitness and seniority-cum-merit. Merit-cum-suitability with due regard to seniority as prescribed in the case of promotion to All India Services necessarily involves assessment of comparative merit of all eligible candidates, and selecting the best out of them." (*Para 12, page 707*).**

He further submits that these principles have been reiterated in Harigovind Yadav v. Rewa Sidhi Gramin Bank and others (2006) 6 SCC 145, holding that comparison of merit is not the criteria to be applied in cases of consideration of seniority-cum-merit.

Learned counsel appearing for the bank has submitted that the rule has to be read as a whole and the clauses cannot be considered in isolation giving primacy to one part over the other. According to him, the petitioner did not satisfy the bench mark which has been provided for eligibility i.e. that a candidate should obtain at least 50% marks in the interview. According to learned counsel, clause (j) of the Third Schecdule provides that the selection shall be on the basis of

performance in the interview and Performance Appraisal Reports for the preceding five years as per the division of marks specified therein and that such marks are provided under various heads to assess the performance. 25 marks have been allocated to the interview in which the minimum qualifying marks are 50%. In other words, if the petitioner had secured 12.5 marks, he would have been promoted without any other consideration. He submits that the bench mark for qualifying had been fixed and it is only thereafter that seniority would be applied for determining the promotion. In the present case, the petitioner has secured only 11 marks. Having failed to achieve the benchmark of eligibility, the challenge on other grounds becomes academic. He submits that whatever mode is adopted for promotion, there is no prohibition in providing for basic minimum qualifying criteria more so as the officers have to discharge duties of responsibility for which some assessment is necessary in order to judge suitability. Learned counsel has placed reliance on K. Samantaray v. National Insurance Company Ltd. (JT 2003 (Suppl.1) SC 400). He submits that the rule has to be interpreted as laying down the criteria recognized by the Hon'ble Supreme Court in this case holding that:

"6. In all services, whether public or private there is invariably a hierarchy of posts comprising of higher posts and lower posts. Promotion, as understood under the service law jurisprudence, is advancement in rank, grade or both and no employee has right to be promoted, but has a right to be considered for promotion. The following observations in *Sant Ram Sharma v. State of Rajasthan and Ors. (AIR 1967 SC 1910) are significant:*

"The question of a proper promotion policy depends on various conflicting factors. It is obvious that the only method in which absolute objectivity can be ensured is for all promotions to be made entirely on grounds of seniority. That means that if a post falls vacant it is filled by the person who has served longest in the post immediately below. But the trouble with the seniority system is that it is so objective that it fails to take any account of personal merit. As a system it is fair to every official except the best ones; an official has nothing to win or lose provided he does not actually become so inefficient that disciplinary action has to be taken against him. But, though the system is fair to the officials concerned, it is a heavy burden on the public and a great strain on the efficient

handling of public business. The problem, therefore, is how to ensure reasonable prospect of advancement to all officials and at the same time to protect the public interest in having posts filled by the most able man? In other words, the question is how to find a correct balance between seniority and merit in a proper promotion policy.

7. The principles of seniority –cum-merit and merit-cum-seniority are conceptually different. For the former, greater emphasis is laid in seniority, though it is not the determinative factor, while in the latter merit is the determinative factor. In *The State of Mysore and Anr. V. Syed Mahamood and Ors. (AIR 1968 SC 1113),* it was observed that in the background of Rule 4(3) (b) of the Mysore State Civil Services (General Recruitment) Rules, 1957 which required promotion to be made by selection on the basis of seniority cum merit, that the rule required promotion to be made by selection on the basis of "seniority subject to fitness of the candidate to discharge the duties of the post from among persons eligible for promotion". It was pointed out that where the promotion is based on seniority-cum-merit the officer cannot claim promotion as a matter

of right by virtue of his seniority alone and if he is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted. But these are not the only modes for deciding whether promotion is to be granted or not.

10.In *Syndicate Bank* case (supra) observations in para 14 throw considerable light on the controversy. The third mode (apart from seniority-cum-merit and merit-cum-seniority modes) has been recognized. It has been described as a "hybrid mode of promotion". In other words, there is a third category of cases where seniority is duly respected and merit is appropriately recognized.

12. Reading of the whole policy reveals that stress was not on seniority alone and weightage was sought to be imposed on merit and other relevant aspects also. In view of this conclusion, it is not necessary to go into the question of fence-sitting stand adopted by the appellant and non-impletion of affected persons. There is no scope for interference in this appeal, which is accordingly dismissed. Costs made easy.

(Pages 403, 404, 405 and 406 paras 6, 7, 10 and 12).

Learned counsel submits that in the totality of circumstances, the rules of the bank governing the promotion to the next higher post have to be considered in accordance with law laid down in this case. Primacy of seniority has not been given a go by in the rules, but surely when promotion to a managerial post is being considered, some bench mark is to be fixed before a person is considered for promotion.

I have gone through the records which forms the basis of promotion in accordance with rules. There is no doubt that the petitioner has not achieved the bench mark of 12.5 marks out of 25 marks as provided by the rules and it is in these circumstances that the petitioner has not been promoted although he has been considered.

Learned counsel for the petitioner submits that there is no need for any appraisal reports, nor of interview and that the promotion is to be governed solely by seniority as the rule of seniority-cum-merit does not admit of comparative assessment of merit. This submission cannot be accepted. A rule is to be interpreted as a whole and given effect to as such and cannot be applied in truncated parts ignoring those which

do not suit the petitioner. A combined reading of the rule shows that a benchmark of eligibility has been fixed. The petitioner having failed to achieve this qualifying mark, cannot make a grievance that his case has been ignored or that the rule postulates only consideration of seniority. As held by the Hon'ble Supreme Court in *K.Samantaray's* case, consideration is a right not promotion. In Ved Prakash and others v. State of Haryana and others (2002) 10 SCC 359, it was held:

> **"…The expression "seniority-cum-merit" by any stretch of imagination cannot be construed to be equivalent to seniority alone as concluded by the learned Single Judge. Where a promotion is based solely on the basis of the seniority, then there is no question of adjudging the merit of the relevant contesting candidate and promotion is bound to be given on the basis of the seniority in the feeder cadre. But, when Rule 9 itself provides that the promotion is based on the criterion "seniority-cum-merit", it is difficult to comprehend how "merit" will be ignored from consideration, particularly when the selecting authority brought to the notice of the Court that the senior persons were duly considered but were adjudged unsuitable to hold the**

> **promotional post because of their performance in the feeder cadre and/or because of some proceedings pending against them…**

As held in K.Samantaray's case and in *Harigovind Yadav's case* (supra), interview can be held and assessment of performance can be made by the bank for adjudging suitability for promotion by providing a benchmark for selection whereafter seniority would have preference. A reading of the rules shows that basic minimum criteria has been prescribed for consideration. Providing for securing 50% marks in the interview cannot be described as arbitrary or unconstitutional. Having failed to achieve the qualifying standard, the petitioner cannot make any grievance of his case having been ignored. In the circumstances, there is no merit in the petition which is accordingly dismissed. There shall be no order as to costs.

July 17, 2007.(PC). (Dev Darshan Sud), J.